UNITED STATES COURT OF APPEALS
For the Ninth Circuit

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,
Additional Cross-Appellee as to Count No. 4 only.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF HILLTOP REALTY, INC., et al., AS APPELLEES

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December 9, 1966

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INTRODUCTION

Appellants, Larry P. Smith & Co., its partners, executives nd employees, including Treiger (R. 1058-9), are herein termed Smith". Appellees, Hilltop Realty, Inc. (R. 1054), and the two Winslow sisters", Mesdames Ashcraft and Powell (R. 1055), are collectively termed "Hilltop". Cross-appellee on antitrust Count 4, he Austin Company (R. 1060), is termed "Austin". Where appropriate, individuals are identified by name, and the sisters as the Winslow sisters".

Hilltop's Answering Brief on Appeal supports the Dist
Court's Findings of Fact of actual and gross fraud and its
sions of Law awarding compensatory and punitive damages an
attorneys' fees (R. 1469ff, 2028ff). It is arranged by Fi
with cross-reference to each of Smith's Specification of E
(cf. Smith Op. Br. 26-8).

Hilltop's Opening Brief on Cross Appeal is concurrent
filed. It claims primarily that the District Court erred
cluding:

1. That Hilltop's original and amended Complaints (R
111-2), documented by its Contentions of fact (R. 651-91),
state a cause of action for antitrust violation (R. 829-31
in granting partial summary judgment and dismissal (R. 953
foreclosed Hilltop's demand for jury trial on the merits o
antitrust issues (R. 9, 114, 2147); and

2. That Hilltop did not sustain its burden of proof
Nutwood property, then owned by the Winslow sisters, had a
age fair value of $17,500 per acre as a regional shopping
site rather than the $3,500 per acre which they accepted i
liance upon the fraudulent concealment by Smith of its imp
purchase of Severance and of its fraudulently negative mar
analysis of Nutwood as a potential regional shopping cente
(R. 1469-70).

The District Court had jurisdiction of Counts 1, 2 and 3 by iversity and amount, 28 U.S.C., §1332 (R. 1ff, 100ff, 1053); nd of the Sherman Act Count 4 under 15 U.S.C., §§1, 2 and 15, and 8 U.S.C., §§1331 and 1337.

Hilltop's Motions of October 26, 1966, to dismiss Smith's ppeal for want of jurisdiction and because it violated this ourt's rules and practice governing length of brief and permis-ible contents of an appendix, is hereby resubmitted for recon-ideration or rehearing at hearing on the merits under Rules 15 nd 23 if not granted during the interim since setting in mid-ovember 1966. Without prejudice, Hilltop respectfully submits ts Answering Brief on appeal.

ADDITIONAL MEMORANDUM DECISION RE PUNITIVE DAMAGES

Smith's Appendix (Smith App. 9-26) omits a Memorandum Deci-ion (R. 1021-3) on its conflict of law issue of punitive damages Smith Op. Br. 26-7, 35, 54-61). It is attached as Appendix A.

COUNTER-STATEMENT OF THE CASE

Hilltop does not accept all of Smith's Statement (Smith Op. r. 2-26) and accordingly submits its counter-statement.

A. Questions Presented.

Smith's Appeal and its Specification of Errors present the ollowing questions:

since there is sufficient oral and documentary evidence to s
the Court's ultimate findings that Smith was guilty of actu
fraud and of gross fraud under Ohio law because of Smith's e
treme and exceptional conduct which was intentional and de
(R. Vol. IV; Tr. Vols. I-XIII; and Exhibits filed)

2. Is the Court's finding of compensatory damages, ba
Smith's bill for its uncompleted false report, supported by
evidence and within the Court's discretion? (R. 2029, 203

3. Do the findings support the Court's conclusion on
facts that punitive damages are properly awarded under Ohi
(Memo Dec.* R. 1469-74, 2028-39)

4. Is the Court's finding that Hilltop was fully just
in bringing this lawsuit supported by the evidence? (R. 1,
R. Vol. IV; Tr. Vols. I-XIII; and Exhibits filed)

5. Is the Court's award of punitive damages based on
actual out-of-pocket expenses, and of attorneys' fee which
compensate fully for their time but which the Court believ
reasonable under the circumstances, a reasonable exercise
Trial Court's discretion? (R. 1474, 1498ff, 2038; cf. Res
Torts, §908, Comment (e))

6. Is Smith accordingly bound under Ohio law for suc

---

* Reprinted in Smith's Appendix using Transcript reference
App. 9-26). An important difference is the Court's init
deletion of a significant statement (R. 2029, line 29).
does not appear in the Reporter's Transcript version (Tr
line 4).

7. Did the Court correctly interpret Washington law of public policy in affirming Ohio punitive damage law against Washington defendants who voluntarily ventured into Ohio to perform their misdeeds? (Memo Dec. R. 1021-3; App. A)

8. Whether, accordingly, the Court's judgment on Smith's appeal should be affirmed; except as challenged by Hilltop's concurrently filed Opening Brief on Cross Appeal?

B. Summary of Court's Findings of Fact of Actual and Gross Fraud Warranting Compensatory and Punitive Damages.

Hilltop will first summarize the Court's ultimate Findings of Fact. In its Argument section, it will support each Finding in the same sequence, noting cross-references to Smith's differently arranged Specification of Errors. The Trial Court found:

Relevant Findings of Fraud Warranting Compensatory Damages:

1. Smith is liable for actual fraud in concealing from Hilltop its simultaneous negotiations to buy Severance while making its market analysis of Nutwood (R. 1471, lines 18-22);

2. This concealment was material to Hilltop's conduct (R. 1471, lines 22-3);

3. It caused Hilltop to falsely believe that Smith was no more than a consultant on Severance (R. 1471, lines 23-25);

4. This belief was knowingly and intentionally fostered by Smith (R. 1471, lines 24-26);

sultant in selecting it to do a market analysis of Nutwood on Smith's negative market analysis (Ex. 29), in determinin course of conduct after it was received (R. 1471, lines 26-9

6. Hilltop relied on the negative conclusions of Smit market analysis and not on its details in making its decisi sell Nutwood (R. 1470, lines 2-5);

7. Hilltop had a right to rely on an absence of such flict of interest by an expert whose advice was sought beca the very nature of the relationship (R. 1471, line 29 - 147, 1);

8. Since the concealment of the conflict of interest a the Nutwood market analysis totally untrustworthy, Hilltop u financial injury as a proximate consequence: Hilltop Realt damaged in the amount of $2,920 which it paid Smith for its analysis (R. 1472, lines 1-6), and the Winslow sisters were d in a like amount of $2,920 because, the fair value to them of liable and trustworthy market analysis was at least equal to price which Smith billed Hilltop Realty (R. 2028, line 31 - 2 line 16; cf. R. 1472, lines 16-17).

The Court accordingly concluded that:

> ". . . all eight elements of fraud under Ohio law hav been proven by clear, cogent and convincing evidence. (R. 1472, lines 12-14)
>
> 24 O.Jur.2d, Fraud and Deceit, 635, §20.

Under Ohio Law:

The Court further found that punitive damages are recoverable nder Ohio law because:

9. Smith's conduct showed a wanton or reckless disregard f the legal rights of Hilltop (R. 1472, lines 22-24);

10. The fraudulent concealment by Treiger of Smith's poten- ial purchase of Severance was authorized by the respective mana- ers of Smith's New York office and Eastern Division (R. 1472, ine 32 - 1473, line 8); and within the scope of their respective mployment by Smith (respondeat superior stipulated, Tr. 2306).

11. Smith's concealment was calculated, deliberate and in- entional and done pursuant to company policy "as defendants so learly demonstrate in their Post-Trial Brief*, §XIII, p. 99, et eq." (R. 1473, lines 8-11);

12. The inferences are inescapable that one or more of the mith partners were aware of the concealment and at least cquiesced therein because, of Smith's method of doing business, f keeping the partners informed in its far flung organization, nd of its system of reading files (R. 1473, lines 12-16);

13. Treiger's later attempts to justify and minimize the oncealment at his meeting of August 10, 1960, with Hilltop's

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This brief is Paper 260 in District Court Clerk's files. It was not designated by Smith for the Record on appeal. cf. Paper 304, also in District Court Clerk's file, and R. 2198, 2232.

advisor, O'Neill (R. 1054, 1060), must have come to the att
of, or may have been authorized by, one or more of the part
(R. 1473, lines 6-21);

14. Any of these factors, standing alone, supports th
Court's finding that the original Smith partners are joint
severally liable for actual and punitive damages (R. 1473,

On reargument, the Court further found:

15. Although Smith was not motivated by "illwill or l
(R. 2030, lines 20-22), it was guilty of "extreme and exce
conduct" which was "intentional and deliberate" constituti
"gross fraud" under Ohio law (R. 2035, lines 17-20).

Relevant Findings That Hilltop Was Fully Justified in Prosecuting This Suit, Thereby Incurring Substantial Expenses:

The Court further found that:

16. The mistakes, errors and examples of unprofessiona
workmanship which Hilltop found in Smith's original Nutwoo
analysis (Ex. 29) of January 1960 (R. 1212), and later in t
"substantiating report" (Ex. 10) of February 1961 (R. 125
those which they subsequently continued to find, together i
concealed conflict of interest, and other suspicious circu
which they discovered, fully justified the prosecution of h
legal action (R. 1473, line 27 - 1474, line 6);

17. Although Hilltop has been unable to prove all o
suspicions, it has proved to the Court's satisfaction tha

lines 6-10).

On reargument, the Court further found:

18. Smith was obligated to provide a trustworthy market analysis which was rendered totally unreliable and highly suspect by its concealed pre-existing conflict of interest (R. 2029, lines 26-32).

19. Smith also deliberately withheld information, the disclosure of which would have rendered this expensive lawsuit unnecessary (R. 2030, lines 10-14);

20. The errors in the Smith market analysis (Ex. 29) and in the subsequent "substantiating report" (Ex. 10) which was also not free from error, the competitive positions of Nutwood and Severance and other suspicious circumstances:

> ". . . fully justified the prosecution of the fraud and contract counts . . . and also . . . the antitrust counts up to a point which the court need not determine . . ." (R. 2030, lines 1-8)

Thus, the Court awarded:

21. Compensatory damages based on Smith's bill for its false report and punitive damages based on out-of-pocket expenses of Hilltop Realty and of the Winslow sisters, and an attorneys' fee which it found did not adequately compensate Hilltop's counsel for all of the time devoted to the case but, considering all the circumstances, it thought reasonable (R. 2038, lines 15-30).

quoted in Smith's Appendix, but attached hereto as Appendi

Court concluded:

22. Ohio law of exemplary damages was properly appli

Washington defendants who voluntarily ventured into Ohio t

their misdeeds (R. 1021-3).

CONCISE SUMMARY OF ARGUMENT

Smith's Brief ignores F.R.Civ.P. 52(a). It violates

United States, 362 F.2d 899, 901 (9th Cir. 1966), by relyi

various "remarks" of the Trial Court which are "erased" by

Findings. It rejects both the Washington and Ohio rules

tum of proof in fiduciary cases of fraud.

The Trial Court's findings of actual and gross fraud ju

ing compensatory and punitive damages are abundantly supp

the evidence. They were based on credibility of witnesse

documentary evidence in a fraud case which particularly i

the

> ". . . fact finding tribunal's experience with the mainsprings of human conduct."
>
> Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 196
>
> F.R.Civ.P. 52(a).

The Court correctly concluded that punitive damages

be awarded in a Washington trial of defendants who voluntr

ventured into Ohio to commit their misdeeds. See Memoran

sion (R. 1021-3) attached as Appendix A.

R. 1470, 2028, ff.) It determined that reimbursement of liti-
ation expense and modest attorneys' fees considering the time
pent was a proper basis for punitive damages (R. 1469-74, 2036-
. It awarded compensatory damages to Hilltop and the Winslow
sters of $2,920 each, based on Smith's charges for its negative
eport; and punitive damages of $40,000 to Hilltop and $35,000
the Winslow sisters; and $75,000 to them jointly as a reason-
le attorneys' fee (R. 2038). It did this only after Hilltop
bmitted detailed records of its litigation expenses (R. 1498,
79-1811) and time estimates (R. 1500-2; 1508-1518); and of its
torneys' time records (R. 1498-1500; 1529-1678).

Clearly, this was a careful and reasonable exercise of ju-
ial discretion. Smith had been authorized to cross-examine any
tnesses on all expense or time phases (R. 1490) and Hilltop of-
red to produce them (R. 2013). Smith filed Exceptions (R. 1914-
12) which Hilltop denied (R. 2013). Smith then waived oral
oss-examination, and stipulated that all expenses were incurred
d paid (R. 2023), reserving only whether necessarily or reason-
ly so (R. 2023-4); and that attorneys' fees could be determined
lely upon oral argument and records filed (R. 2021-2). At
al argument, Hilltop fully explained its detailed expense and
me records (R. 2043-63) pursuant to the Court's direction that
e scheduled argument should be limited to these factual matters
. 2028). But Smith abandoned that schedule. Instead, one day

". . . sua sponte filed a brief raising issues of law relative to punitive damages which the court thought had been decided and laid to rest long ago." (R. 2028

Smith then reargued, chiefly that punitive damages and attc fees could not be awarded under Ohio law, with brief attent expense or time records (R. 2063-2110).

As a result, the Court again reviewed its prior Memora Decision (R. 1469ff) and reaffirmed that an award of puniti ages and attorneys' fees is proper under Ohio law (R. 2028f) which it had previously concluded was enforceable in Washi (R. 1022).

Smith does not claim the Court abused its judicial disr tion. The amount of punitive damages normally left to a jury should be upheld a fortiori where a Trial Court has carefuly sought, explained and applied its modest award which only re penses out-of-pocket expenses of litigation arising out of m gross fraud; and reasonable attorneys' fees determined in a manner. The Court carefully exercised its discretion,

Twentieth Century Fox v. Goldwyn,
328 F.2d 190, at 221-2 (9th Cir. 1964).

Accordingly, the judgment on Smith's Appeal should be affirmed; except in other respects noted as Specification Errors in Hilltop's concurrently filed Opening Brief on Cr Appeal.

A. Applicable Principles on Review.

F.R.Civ.P. 52(a) Governs Appellate Review:

Smith repeatedly and erroneously claims the facts are almost ntirely undisputed (Smith Op. Br. 1, 11, 15, 16, 31, 40), but its ppendix of 60 pages of selected Transcript excerpts from a 12-day rial to support its factual contentions (Smith App. 88-147), and 3 pages from some 200 pages of Admitted Facts (R. Vol. IV) chosen or the same purpose (Smith App. 26-88), protest too much. The rial Court, on all of the evidence and after extensive briefs, ade findings that reject Smith's claim.

Smith's Brief is silent as to F.R.Civ.P. 52(a). This rule pplies whether or not the trial court has had opportunity to udge the credibility of witnesses, and it:

> ". . . should not . . . encourage appeals . . . based on the hope that the appellate court will second guess the trial court."

Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962).

The principal witnesses testified in person, as well as by epositions, so there was a clear opportunity to judge the credi- ility of witnesses in vastly conflicting evidence; even in di- ergent statements by opposing witnesses in the Admitted Facts. or example only, compare Treiger's version of the meeting of ctober 8, 1959 (R. 1190-1) quoted in full Text (Smith App. 47), nd O'Neill's version (R. 1191-4) only partially quoted (Smith App. 7-9), particularly the content deleted (R. 1192, line 21 - 1193,

line 20). Smith's Brief [illegible] to the transcript in the App[illegible] and erroneously claims "the two memos are not in conflict t[illegible] occurred"(Smith Op. Br. 11). Hilltop submits that, only a[illegible] ination of the Record and Transcript, will reveal the subs[illegible] differences.

Smith's Unauthorized Reliance on "Intervening Remarks of the Court":

Smith's Brief seeks to buttress its Specification of [illegible] by partial quotes from intervening pretrial and post-trial[illegible] during successive hearings. It calls these, "oral opinion" Op. B. 2); or "tentative oral opinions" (Smith App. 1); or "[illegible] at oral argument" (Smith App. 1, 15). During the lengthy r[illegible] the Court made many oral remarks which might be invoked by ei[illegible] side. The short answer is that all such "remarks" are mer[illegible] the Court's two Memorandum Decisions which comprise its F[illegible] of Fact and Conclusions of Law (R. 2038-9). This Court ha[illegible] currently held in Ogle v. United States, 362 F.2d 899, 90[illegible] 1966):

> "Ogle partially relies on remarks made by the trial court as the trial progressed . . . but such remarks must be considered erased by the findings of fact ultimately made . . ."

The Burden of Proof in a Fiduciary Case:

Smith contends* that the burden of proof here is almost a criminal case, citing Asheim v. Pigeon Hole Parking, In[illegible] 175 F. Supp. 320, 328 (ED Wash. ND 1959), affirmed 283 F.[illegible]

*Smith Op. Br. 42.

The trial court's opinion, on wholly different facts, was derived from an earlier Washington case which quoted a portion of 37 C.J.S. Fraud, §94. But those facts did not require reference to its footnote 98, p. 400, captioned, "Fiduciary or Confidential Relationships as Exception", nor to its cross reference, §95, pp. 401-2, that there is a presumption of fraud by fiduciaries which alters the burden of going forward with evidence:

"... to show that his conduct was free of fraud."

The Trial Court found a fiduciary duty by Smith when it accepted employment as an expert for Hilltop because of the "very nature of the relationship between the parties" (R. 1471). In its prior Memorandum Decision dismissing the antitrust counts, the Court held:

> "By plaintiff's own allegations its injury was caused by the fraudulent breach of a fiduciary duty." (R. 829, lines 26-28; cf. R. 1450)

Accepting Smith's premise that Washington law governs the "quantum of evidence" required (Smith Op. Br. 41), Crocker v. Boyd, 88 Wash. 685, 687, 153 Pac. 1076 (1915), is applicable:

> "The law, as is so often said, does not presume fraud. Except in fiduciary cases, it extends no presumption to those who charge it." (Emphasis added.)
>
> In re Uzafovage's Estate, 153 Wash. 620, 623, 280 Pac. 85 (1929).
>
> Westerbeck v. Cannon, 5 Wn.2d 106, 120, 104 P.2d 918 (1940).

§§76, 77, 226, 230.

The evidence summarized below shows a clear advantage ... Smith in concealing its purchase of Severance and in render... negative report on Nutwood because Smith knew (Treiger, R. ... what Petti did not (cf. Petti, Tr. 161) "the competitive po... of Nutwood and Severance", as the Court so found (R. 2030, ...

Thus, F.R.Civ.P. 52(a), the erasure of "remarks", and h... den of going forward by a fiduciary, are controlling factor... Smith's Appeal.

B. The Court's Findings Of Fact Are Supported By The Evidence And Its Conclusions Of Law Properly Apply Ohio And Washington Law.

Hilltop's Proof Of The Eight Elements Of Actual Fraud

Smith's Brief concedes its Appeal turns largely on wh... the Court's findings of actual fraud (R. 1471-2, 2034-5) i... ported by clear, cogent and convincing evidence as to each ... ment (Smith Op. Br. 41). Smith apparently concedes it was ... of four of the eight elements, 24 O.Jur.2d, Fraud and Dece... §20, because it claims four are missing: intent to deceive ... materiality, reliance, and damages (Smith Op. Br. 26). Si... four elements, to a degree, are inter-related and overlapp... since Smith's arguments are interspersed throughout its Br... (cf. Smith Op. Br. 3-5, 8-12,15-20, 24-26, 28-32, 40-51), ... will document briefly each of the Court's eight Findings ...

[Smith's Spec. of Error No. 1]

This is conceded in the Admitted Facts (R. 1248, ¶317).

Finding No. 2 of Materiality (supra, p. 5)
[Smith's Spec. of Error No. 1]

When Smith received Hilltop's initial letter inquiry, its Account Executive, Treiger, immediately originated a "long" telephone call to Hilltop's President, Petti (R. 1188-9).

In accordance with company practice, he made an interoffice memorandum of his call to the "reading file". It is regularly distributed to Smith's various offices and is "available to everyone in the Smith organization" (Treiger, Tr. 2764); so that they can know what is going on (Head, Tr. 688-9; Imus, Tr. 737, 748-9, 758-9; Orrico, Tr. 2099; Smith, Tr. 2451-2), including report writers (Darmstadter, Tr. 807), and partners (Orrico, Tr. 2099; Smith, Tr. 2451-2). The distribution includes not only interoffice memoranda but also incoming letters. Thus, Hilltop's initial letter of inquiry (Exs. 27, 28) shows Xeroxed distribution to all of Smith's offices.

Treiger's first reading file memorandum pertaining to Hilltop thus reported "to everyone in the Smith organization" that Nutwood was in Severance's secondary trade area but that Petti "is not aware of course of our possible ownership position there", and that Nutwood would have regional access after the freeways "are completed" (R. 1189). But, in all Treiger's negotiations with Petti, he never disclosed to Petti either this trade area overlap between

He only told Petti ambiguously that "we are working" o "we were working" (R. 1189) or "had worked" (Tr. 163-4) on Severance and that "there might be some conflict in our own tion" (R. 1189). These half-truths did not reveal to Hillt Smith's pending purchase of a competitive shopping center s Petti testified:

> "He asked me if I knew that they had worked on the Severance property. I told him I did. He expressed some doubt as to the ethical position that they were in and would need some time to see whether they could take on our job, and this was the entire revelation that he had given me relative to the Severance Center. (Tr. 163-4)

Treiger asked Orndahl, then manager of Smith's New Yo how to handle this "in view of our possible investment in Severance" (R. 1189). Smith concedes, at that very moment "Orndahl was involved in negotiations looking to the possi chase by the Smith firm of an interest in Severance" (Smit Br. 10).

In a later "reading file" memorandum, Treiger said he spoken to Orndahl who agreed "we ought to try and handle" request (R. 1190). He again talked to Petti and told him

> ". . . as long as he recognized the fact that we have been acting on the Severance Estate for some three years, we believe we could act for him." (R. 1190)

Treiger said not a word about Smith's impending purchase c Severance, and reported that Petti accordingly replied:

[Smith] had taken four days to think about the ethical conflicts of interest problem." (R. 1190). (Emphasis added.)

Meanwhile, Petti had also been working on developing Nutwood ince 1958 on behalf of the Winslow sister owners through O'Neill, neir long-time family attorney and business advisor (R. 1060, 137). He came to the conclusion that he needed expert assistance o develop Nutwood as a regional shopping center (Tr. 154) and elected Smith as having the greatest stature (Tr. 156).

Smith now argues that the concealment is not "material" Smith Op. Br. 30-31) and that "all relevant evidence" indicates nat, if Hilltop had known that Smith was buying Severance, it ould have hired Smith anyhow because Petti believed that Nutwood nd Severance were noncompetitive (Smith Op. Br. 30-31, 45-6). hould erroneous economic beliefs of non-experts who agreed to pay 4,500 for what he believes to be an independent expert, be rele- ant to materiality, either of Hilltop Realty or the property wners, the Winslow sisters?

The evidence shows Hilltop wanted an objective study by an xpert consultant (R. 1169), not an incipient competitor who at nce recognized the "competitive positions of Nutwood and everance" (R. 1189, line 2, 2030, line 3). So did the owners and heir attorney (Ex. 371, p. 164). Petti knew nothing of the im- ending Smith purchase, but thought Higbee and Halle's location at everance was an accomplished fact because of the February 22, 1959, ewspaper announcement (Petti, Tr. 164; R. 1153):

all practical purposes their work [at Severance] had b
accomplished, had been successful and we were hoping t
would be ready for another job and would do equally as
good a one for us." (Petti, Tr. 164)

Nor did Petti know the vital department store leases h
been executed until over ten months later, on December 22 a
1959 (R. 1205, 1207); nor that Smith's pending purchase of
Severance was wholly "contingent upon execution of these de
ment store leases" (Ex. 313, p. 2, ¶6).

Clearly the concealment was material to the goal of H:
Realty and the owners to promote Nutwood by an expert's "o
study" (Treiger, R. 1189).

Finding No. 3 of Hilltop's Belief that Smith Was
No More Than A Consultant (supra, p. 5). [Smith's
Spec. of Error No. 1]

This appears self-evident. Smith made no disclosure n
long after Hilltop sold Nutwood on April 29, 1960 (R. 123
Smith meanwhile was negotiating to buy Severance from Austn
had bought it (R. 1225, 1248).

Finding No. 4 of Smith's Intent To Deceive
(supra, p. 5). [Smith's Spec. of Error No. 1]

Smith contends in effect that Smith's concealment di
meet the test of 24 O.Jur.2d, Fraud and Deceit, §5, (Smit
28-9). But its very quotation convicts. When Smith withe
Petti the critical knowledge of Smith's "possible ownersh
tion" or "possible investment position" in Severance (R.
was clearly an "intention" or "cunning deception . . . u

Smith misquotes the Court as finding that Smith was not ctuated by "malice or illwill" (Smith Op. Br. 29). It found hat Smith's action was not motivated by "illwill or hatred" R. 2030). And it did this only in a context of rejecting Smith's rgument that a fraud case required these personal elements. The ourt found Ohio law authorized punitive damages, in the disjunc- ive, where the action is for "fraud, malice or insult or wanton nd reckless disregard of plaintiff's rights" (R. 2031).

Smith also contends that the Court found Smith's sole motive as to carry out a commitment to Austin to keep the negotiations onfidential, relying on oral "remarks" of the Court (Smith Op. Br. 9). The Court made no such finding, Ogle, supra.

Smith did not claim error (Smith App. 26), in the Court's dir- ction that its two Final Memorandum Decisions

> ". . . shall serve as findings of fact and conclu- sions of law." (R. 2038-9)

t rather ignores them when the Court's intervening "oral remarks" eem beneficial. To utilize, as Smith does throughout its Brief, ral remarks as though they were findings is clearly erroneous, gle, supra.

Moreover, if pertinent, the remarks relate to "direct inancial profit" as contrasted with Austin's "goodwill". There s evidence, meeting the "clearly erroneous" test of F.R.Civ.P. 2(a), that it was Smith who opposed publicity (R. 1177). On

Severance (R. 1226). On February 16, 1960, Treiger, and N
of a Smith affiliate, decided "the time was not right to a
[the department stores] that we are purchasing the propert
(R. 1227). On the same day, Larry Smith's Executive Secre
Miss Bitz, summarized a meeting with Austin a day before t
sale on February 9, 1960, stating it was agreed that any p
announcement should refer to Smith's activities as relatir

> "only to management and leasing activities for the time being." (R. 1228)

At the same time, Treiger recommended announcing, at leas
department stores, Smith's participation in the ownership
Severance (R. 1229) and said he cleared up Smith's positi
Halle Bros. On February 20, 1960, Larry Smith wrote Aust
an announcement because an insurance company representati
ested in financing Severance told him in public that

> ". . . Austin . . . had told them they were disposin of their interest to us." (R. 1230)

But Hilltop was not advised and did not know of any such
until partially disclosed in newspaper announcements in l
July 1960 (R. 1244; Petti, Tr. 165-6). On this ground alo
ever the Smith-Austin business motives, there was clearly
"intent to deceive" Hilltop.

There were additional motives, while closing a $4,0
purchase of Severance, for Smith to take on a $4,500 job
stallment payments (R. 1202). Nutwood, properly guided

stood as a real threat to Smith's commitment to buy Severance. Smith knew that, if Nutwood came into being, it would have diluted Severance (Marshall, Tr. 1689). Smith knew that a favorable report on Nutwood would have been of benefit to its development (Steinberg, Tr. 587) and that Nutwood would be competitive with Severance even though it was not in its primary trading area (Steinberg, Tr. 589) and that driving time between Severance and Nutwood was only about twenty minutes (Steinberg, Tr. 596).

Scarcely had Smith begun its work for Austin in 1955 to develop Severance into a regional shopping center, when one of their primary prospective department store tenants, The May Co., announced it would construct its branch store 1-1/2 miles from Severance at Cedar Center (R. 1066).

The other primary prospective tenants, Halle (R. 1085) and Higbee (R. 1086) were concerned about the blight in the old residential area near Severance and the deterioration of the population nearby within the next 20-year period and thought seriously of going "farther out into suburban areas . . . where blight would not catch up to the location for a good deal longer" (R. 1089-90).

Smith was continuously concerned about:

> ". . . the risk of a third development taking place . . . on the east side . . ." (R. 1108, lines 16-20)

ing participation in its purchase of Severance, that:

> "The only really significant competition that Severanc faces on the east side is the large May Co. . . . bra store a couple of miles away . . ." (R. 1158)

and enclosed a brochure which summarized Smith's five year struggle to execute long-term department store leases whic

> ". . . took the usual stormy course with competing properties keeping the negotiations off balance . . .

and that its purchase was

> ". . . contingent upon the department store leases being concluded." (Ex. 313, p. 2, ¶¶1, 6)

Meanwhile, Petti, Hilltop's president, had worked on e ing Nutwood as a regional shopping center, seeking to obta department store as a dominant tenant. He "came to the co sion that I would need expert assistance if I was going t about the end results which we were seeking" (Petti, Tr.

While Severance and other eastern Cleveland potentia had encountered zoning problems (Smith Op. Br. 21; R. 110), favorable zoning of Nutwood was a reasonable likelihood (

Based upon all of this knowledge, Treiger's pursuit f confirms an intent to deceive. Petti did not, as Smith a initiate Treiger's coming to Cleveland for a meeting (Smi Br. 11). On the contrary, it was Treiger, in writing to September 30, 1959, enclosing his written proposal, who

> "if you feel, however . . . that a preliminary dis- cussion or personal meeting with a representative

us to undertake the work we would be happy to arrange such a meeting in Cleveland at your convenience or that of your principals." (Ex. 33)

It was Treiger - not Petti - who called on October 5, 1959, to find out the status of its proposal and then reported that Petti had asked for the personal meeting which Treiger had suggested (Ex. 35; R. 1190).

On October 8, 1959, Treiger reported in an interoffice memorandum that Smith had "a 60-40 chance of landing the job" (R. 1191). Treiger continued to pursue Petti - on October 19, 1959 (R. 1195), on November 16, 1959 (R. 1197), and on December 4, 1959, agreeing to installment payments of the fee (R. 1202).

The negative report itself shows further intent to deceive on its face. When the field work was undertaken, the report writer, John Marshall, delineated Nutwood's primary trading zone as a 3-mile radius extending north across Euclid Avenue to Lake Erie (R. 1204). The field man, Darmstadter, knocked out the area north of Euclid Avenue which contains the densely populated Village of Euclid (cf. Plate 1, Smith Op. Br.) because of the "industrial belt" (R. 1206). However, as early as 1955, a Smith report on Severance (reprinted in January 1960) concluded this same industrial belt "will not seriously impede shopping trips of customers traveling to Severance" (Ex. 118, p. 21; Tr. 1683). Neither Darmstadter, the Field Man, nor Marshall, the Report Writer, was ever told about the report by Treiger (R. 1723; Tr.1681

However, the trade area of Nutwood was changed from t
circle delineated by Marshall including the population nor
Euclid Avenue and the populous Village of Euclid to an ell
shape that bordered Euclid Avenue on the north and exclude
population (Ex. 29, facing p. 1).

Darmstadter does not recall being shown a then curren
port of the Cleveland Planning Commission of "Shopping Cen
Opportunities in Eastern Cleveland" which had been furnish
Smith (Tr. 1723-4; R. 1181; cf. Ex. 209B).

Onefurther example of intent to deceive is the willfu
holding of the 3-page "INTRODUCTION" (Ex. 175) to the Nutw
report (Ex. 29). This unused Introduction would have beer
value to Hilltop (Tr. 837-8). It contained vital informa
cerning Montgomery Ward and other potential tenants for N
(Ex. 175). It is marked "Not used in report" and "None o
used in report to client". It was Treiger who decided to
hold it (Tr. 1576). No possible explanation is given fort
deletion except at trial Marshall said it was "a little to
formal" and it was better to have Treiger's covering lett
(Ex. 29; Tr. 1675). But Smith's own "substantiating repo
(Ex. 10) begins with an "INTRODUCTION" as do most of Smi
other papers, e.g., Ex. 11, captioned "Work Book".

It is submitted that, under F.R.Civ.P. 52(a), there
abundant evidence of intent to deceive to support the Co

fostered by Smith.

Finding No. 5 that Hilltop's Reliance on Smith's Negative Report Determined Its Future Conduct (supra, p. 6). [Smith's Spec. of Error No. 1]

This appears to be conceded. However, Smith assumes for argument that O'Neill and Petti relied upon Treiger's statements as to Smith's consulting relationship when they sold Nutwood (Smith Op. Br. 47). It never argues otherwise. Instead, it contends:

> ". . . such reliance would be of no consequence unless they relied on the Smith report and the Smith report was incorrect." (Emphasis by Smith) (Smith Op. Br. 47)

Smith poses a false premise by analogy to a broker's statement of precise figures of income, etc., as accurate. Here, we have no precise figures but, instead, a report which Hilltop learned after its reliance and sale of Nutwood was far from precise, and based exclusively on judgments that can differ widely as to volume of business, size of trade area, "suburban share" and "effective competition" (Smith, Tr. 2355-7). Long after Hilltop sold Nutwood in reliance on Smith's negative report, Treiger told Petti and O'Neill for the first time that in its market analysis:

> "Differences of opinion can exist in connection with the same set of facts . . ." (R. 1247)

While these sophisticated economic facts may be true, Hilltop did not know this. It is no defense to a wrongdoer to call attention to his victim's "gullibility". Janness v. Moses Lake

Development Co., 59 Wn.2d 151, 160, 254 P.2d 363 (1951).

Accord: Royal Air Properties, Inc. v. Smith, 333 F.2d 568, 572 (9th Cir. 1964).

Clearly, in such a "judgment" area, and regardless of ideas, Hilltop would not have employed or relied on the ne report by a so-called "independent consultant" who was buy Severance and concealed from the start their knowledge, as market analysts, that Nutwood was in Severance's secondary area and "in a pretty strategic location" (Treiger, R. 118 Petti, Tr. 161, 234).

> Finding No. 6 of Hilltop's Reliance On Smith's Negative Conclusions In Selling Nutwood (supra, p. 6). [Smith's Spec. of Error No. 1]

Once again, Smith lifts from "remarks" of the Court under Ogle, supra, are erased by its Final Decision, some from oral argument April 22, 1966 (R. 2089; Smith Op. Br. But Smith concedes immediately afterwards:

> ". . . the court held that the 'plaintiffs relied on the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills.'" (Smith Op. Br. 47; R. 14

Smith's chief reliance is upon a statement by Petti in cross-examination that he accepted the favorable portion Smith report such as good access but did not rely on the tive aspects that there was too much competition to whic answered: "I think that was precisely my conclusion as report" (Smith Op. Br. 16).

could see with his own eyes the land, population, access, etc. He did not understand the sophisticated economic language of the Smith methodology (Tr. 231, 342-5). He always believed that the site was desirable. But just previously, he was asked:

> "Q. Did anything occur between January 18 [1960] the date of Mr. Treiger's conference with you in Cleveland and January 29 [1960] to change your mind that Nutwood was suitable for a regional shopping center?
>
> "A. I don't think anything changed my mind. The only thing was the report submitted to me that caused us to abandon our program. It didn't mean that somebody else couldn't take it on." (Tr. 399)

He testified on redirect that he and his associates accepted the conclusions as to the negative potential for Nutwood (Tr. 442) and that:

> "If I answered other than the fact that we accepted their conclusions on cross examination, I certainly didn't intend to." (Tr. 442-3)

The Winslow sisters, owners of Nutwood, had moved from Cleveland and desired to sell Nutwood (R. 1055). They had no real estate experience (Tr. 76, 121) and relied on O'Neill, their long-time family attorney and business advisor, about the sale of the property (R. 1060). When Petti first called on a Winslow sister at Nutwood, she referred him to O'Neill (Tr. 147).

In May 1958, Petti and his chief advisor on Nutwood, Crume (Tr. 472), first called on O'Neill and recommended that Nutwood be developed or sold as a proposed regional shopping center site

(Ex. 381, p. 18) because Hilltop believed it would yield a "much higher price per acre than . . . for any residential ment" (Ex. 371, pp. 22-3) and, accordingly, proposed an ac ated commission if the Winslow sisters' property was succe promoted as such a site (R. 1138).

Hilltop Realty was a small real estate company in the suburbs of Cleveland engaged primarily in residential sale (R. 1054). Petti, its president, was self-educated except two years of high school. He had worked for his father as cement finisher, contracted tuberculosis and spent several in a sanatorium, then worked as a taxi driver, and finally real estate salesman (Tr. 143-4). He had had very limite perience with two neighborhood shopping centers - superma drug store, bank, etc. (Tr. 145), but no technical knowle economic study for regional shopping center development (R. 1045). In the Spring of 1959, he attended his first s center convention and was impressed by defendant Larry Sm participation in a panel discussion (Tr. 153). As a resu

> ". . . came to the conclusion he would need expert assistance . . . to bring about the end results . . we were seeking . . . on the Nutwood property." (Tr.

In September 1959, he wrote identical letters to Sm and to two other nationally recognized market analysts, and Perry Meyers (Ex. 371, pp. 12, 13). The letters des Nutwood's location in Cleveland, its prospective freeway

tions were requested as to the proper "type of market analysis" and fee quotation (R. 1188). Their various fees were comparable in a $4/5,000 range, and each indicated familiarity with suburban Cleveland shopping center developments (Exs. 204, 217, 32). Hoyt and Meyers replied by letter (Exs. 204, 2d sheet from bottom, 217). Treiger made his "long" telephone call to Petti (R. 1188-9)

Larry Smith is a charter member of the American Society of Real Estate Consultants. He served on its Professional Ethics Committee (R. 1062) which drafted a Code of Professional Ethics. It provides that each member will:

> "Accept counseling assignments only when there is no conflict of interest, unless after full disclosure all parties concerned approve the basis of acceptance." (Ex. 20; R. 1062)

But, although Hilltop ultimately selected Smith to make the market analysis of Nutwood for $4,500:

> "Smith did not at any time before August 10 or 12, 1960, disclose to plaintiffs or Mr. O'Neill that Smith was negotiating to buy Severance from Austin or that it had bought Severance from Austin." (R. 1248)

Smith also claims that two letters "give the lie" to reliance and "cast a dark shadow on Petti's integrity" (Smith Op. Br. 19). Nothing could be further from the truth. Exhibit 348B on the interleaf between pages 18 and 19 of Smith's Brief is just like many identical letters that he had written before retaining Smith, cf. letter of July 15, 1959, to Mr. Sidney Galvin

(Ex. 371, pp. 103-4; R. 1177-8). It is also similar to ot
letters (Ex. 371, pp. 114-6, Ex. 235).

Exhibit 348A confirms reliance on Smith's negative re
by deleting after January 15, 1960, paragraph 4 of the let
June 12, 1959, referring to department store potentials.
reference on page 3 is to an investigation of soil condit
utilities; not economic feasibility.

There was no reason to withhold these letters nor di
have any knowledge of why they were missing (Petti, Tr. 4
Crume made the file search and does not recall that copie
turned up (Tr. 473). Smith claimed like difficulty in lo
files, cf. Tr. 2513-5.

Smith also claims that Kammer's evidence is controll
(Smith Op. Br. 19-21). But Kammer made earlier offers fo
Ratner to buy Nutwood (Tr. 1661). All of the res gestae,
before any lawsuit was dreamed of, support Petti's contra
testimony. Thus, on August 3, 1959, he wrote O'Neill th
conferred:

> ". . . with Harry Ratner . . . and his attorney, Karl Kammer. A week later he met with Albert Ratner . . . and the senior members of the Ratner clan . . . they insist they want [Nutwood] for residential development; . . . that it cannot support retail or commercial development . . ." (Ex. 371, p. 107)

Res gestae is admissible in a fraud case, Dormitzer v. Saving & Loan Society, 23 Wash. 132, 200-1; 62 Pac. 862 19
24 Am.Jur., Fraud and Deceit 108, §269.

hich the Court's attention is particularly invited. They include
'Neill's letters of December 3 and 11, 1959, recommending to the
nslow sisters a 90-day extension of Hilltop's exclusive to com-
ly with Smith's predicted time (R. 1190) to complete its report
x. 371, pp. 142-3, 152); Petti's of December 4, 1959, that it
s employing Smith at Hilltop's expense and proceeding "inde-
ndently of the Ratners or DeBartolos" (Ex. 371, p. 145); O'Neill's
January 6, 1960, reporting on the Higbee-Halle agreement re
verance, stating:

> "Since Smith made a study of . . . Severance . . .
> it will be interesting to see what he thinks its
> influence will be on . . . Nutwood . . ."
> (Ex. 371, p. 156);

eiger's "reading file" memo of January 18, 1960, that O'Neill,
tti, Crume, etc. "accepted our conclusions" and are now planning
creational land uses (R. 1212); Hilltop to O'Neill of January
, 1960, of that meeting with Treiger and recommending that an in-
rvening Harry Ratner offer of January 13, 1960, to purchase
twood at $3,500 per acre be given strong consideration (Ex. 371,
. 162-3); and most significantly O'Neill's to the Winslow sis-
rs of January 22, 1960, summarizing Smith's negative conclusions,
d Treiger's visit and discussion of recreational land uses, and
lieving Ratner's offer was for residential uses, concurring in
tti's of January 20, recommending that strong consideration of
tner's offer be given by the Winslow sister owners, and

(Ex. 371, pp. 164-7); Petti to DeBartolo of January 28, 19
referring to Smith's report and making it available (Ex. 3
p. 169); Mrs. Ashcraft to O'Neill of February 19, 1960, ex
some doubt about the Ratner offer (Ex. 371, pp. 171-2); O'
urgent recommendation to accept the offer (Ex. 371, pp. 1
Mrs. Ashcraft's reply of February 29, 1960, querying Smit
sudden "downgrade" of the whole idea "and then suddenly u
pop with Ratner's offer -- I suppose no connection -- I h
but expressing her complete confidence in O'Neill's judgm
"full approval to go ahead" (Ex. 371, pp. 181, 182); Mrs.
cabled concurrence in Mrs. Ashcraft's agreement to sell o
19, 1960 (Ex. 371, p. 185); Petti to Treiger of March 19,
paying Smith's bill in full and saying:

> "Notwithstanding . . . your analysis results were . . . negative . . . we do feel you have done a very commendable job. We shall look forward to working with you in the future . . ." (Ex. 47);

Treiger's reply of March 22, 1960, that he:

> ". . . shared your disappointment in the outcome of the analysis"

and hoping "to get together on some future trip to Cleve
(Ex. 48). Not a word was suggested of Smith's interveni
chase of Severance on February 10, 1960 (R. 1229). Nor
Treiger ever heard from afterwards until the concealed f
was discovered (R. 1248).

ot the plaintiff. It is Hilltop. He was one of three "partners", etti, Aveni and Baudo, in January 1960 (Tr. 442). Each of them, nd Crume and O'Neill "accepted" the negative conclusions of mith's report (Tr. 442). Clearly, Hilltop relied. In addition o abundant evidence that Petti relied, his chief advisor, Crume, elied and thought the project "was dead" after receipt of Smith's egative report (Crume, Tr. 486). He asked Treiger at the January 8, 1960, meeting if Smith's negative report meant that "up to and eyond 1970", the existing facilities

> "[are] . . . even now tremendously overbuilt . . ."

o which Treiger, in effect, replied:

> "That is what the facts would seem to indicate." (Crume, Tr. 487-8)

mall wonder that Treiger's "reading file" memorandum of this meet- ng told the Smith partners and all of the professional staff hav- ng access to the file that they "accepted our conclusions" (R. 121

Vincent Aveni relied. He remembers the conversation with reiger and Petti "on other possible uses of the property after heir negative report" (Aveni, Tr. 524).

He knew Petti had gone to a shopping center convention in 959 and had been impressed with Smith's statement that:

> "Experts can pretty well predict . . . the value of any particular site for a shopping center . . . and Petti felt . . . before we could proceed with any major tenants it was going to be necessary to have a qualified report from a top market analyst . . . and he had suggested . . . Smith . . . would be the best, based on what was said at . . . convention . . ."

until after the Smith report (Aveni, Tr. 540).

The oral testimony of reliance confirms the res gesta person claiming to have been defrauded may testify to his upon representation made to him, particularly in a confide relationship, 24 Am.Jur., Fraud and Deceit, §276; 37 C.J.S Fraud, §§35, 39; So. Pac. Co. v. Libby, 199 F.2d 341, 348 1952). The concealment need not have been the sole cause plaintiff's action. It is sufficient if it is one of seve inducements that exerted a material influence, 37 C.J.S., §39.

Under F.R.Civ.P. 52(a), there is abundant evidence o ance by Hilltop's then three partners, and Crume and O'Ne (Tr. 442), and by Petti (Tr. 238-43, 294, 323, 345-7, 230 3), Aveni (Tr. 524), Crume (Tr. 486-8), Mrs. Ashcraft (Tr 85, 87, 97-8, 107), Mrs. Powell (Tr. 122-4, 138), and the O'Neill (Tr. 442, 1868-70, R. 1218-21, 1215-6, 1248).

> Finding No. 7 of Hilltop's Right To Rely On Smith's Report (supra, p. 6). [Smith's Spec. of Error No. 1]

While Smith flags this finding as part of its Specifica of Error No. 1 (cf. Smith App. 12), we find nothing in it that challenges the fiduciary relationship or duty.

In S.E.C. v. Capital Gains Bureau, 375 U.S. 180, 11 237, 84 S.Ct. 275 (1963), a unanimous court held:

> "The content of common-law fraud has not remained static . . . it has varied for example, with . . .

375 U.S. at 193,

and that:

> "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith and full and fair disclosure of all material facts' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 375 U.S. at 194.

The court cited:

Prosser, Law of Torts (1955), 534-5;
Keeton, Fraud - Concealment and Nondisclosure, 15 Tex. LRev. 1
1 Harper & James, Law of Torts (1956) 541.

Accord: Cord v. Smith, 338 F.2d 516, 524-5 (9th Cir. 1964).

Clearly, the Court's Finding No. 7 of Hilltop's right to rely on Smith is correct on the facts and law.

At best, all Smith ever told Hilltop or O'Neill were gross half-truths relating to its "pre-existing consulting relationship" with Severance (Smith Op. Br. 4, subpara. 2). In Equitable Life Ins. Co. v. Halsey Stuart Co., 312 U.S. 410, 425-6, 85 Law ed. 920, 61 S. Ct. 623 (1941), a unanimous Supreme Court quoted with approval, Restatement Torts, §529, that:

> "'A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation' . . . Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue." 312 U.S. at 426.

As this Court held, even in a criminal statutory mail fraud case, Cacy v. United States, 298 F.2d 227, 229 (9th Cir. 1961):

> "Deceitful concealment of material facts is not constructive fraud but actual fraud."

A fortiori, this is true in a common law civil fraud case

> ". . . fraud need not be proven beyond a reasonable doubt . . ."
>
> Mensik v. C.I.R., 328 F.2d 147, 150 (7th Cir. 1964).

> Finding No. 8 of Compensatory Damages Was A Reasonable Exercise Of The Court's Discretion (supra, p. 6). [Smith's Spec. of Errors Nos. 1, 2, 3, 4]

The Court found that all eight elements of actual fraud u law were proven (R. 1472), 24 O.Jur.2d, Fraud and Deceit

On damages, Smith quotes only a negative portion of 24 O.Jur.2d, §151 (Smith Op. Br. 50). The section begins

> "Financial damage is not necessary to the existence of fraud. Although it is sometimes stated that the injury must be one that results in damage in a pecuniary sense, the loss or injury need not necessarily be of a specific pecuniary character. It is sufficient if the fraud has resulted in the loss of a right which the law recognizes as of pecuniary value . . ."

The damage to Hilltop appears clear. In an area wh ment is a factor and many different conclusions can be r obviously Hilltop would not have agreed to a $4,500 fee, paid Smith's reduced bill of $2,920, for a report from a competitor.

The Winslow sisters likewise suffered actual damage wh the trier of the facts could reasonably measure by the p paid for the untrustworthy report. They, too, were den port by an impartial consultant; incurred the detriment extending the exclusive to Hilltop for another year (Ex 3

negative report.

Under Ohio law, they are clearly third party beneficiaries. This was never fully reviewed in the Trial Court. The Court made no such finding. Smith relies upon "remarks" (Smith Op. Br. 53) which are "erased" under Ogle, supra.

Smith knew Hilltop was acting as "representatives of the owners" (R. 1188, line 6, 1191, line 2), and Treiger advised that:

> ". . . our report is basically an owner's report to guide the owner in his planning of the development of the property . . ." (R. 1190, lines 6-7)

There is a strong policy to uphold third party beneficiaries' contracts in Ohio:

> Dombey, Tyler, et al. v. Detroit T.&I. R. Co., 351 F.2d 121, 126 (6th Cir. 1965);
>
> Rhorbacker v. Citizens Building Ass'n Co., 34 N.E.2d 751, 753, 138 O.S. 273 (1941);
>
> Visintine & Co. v. New York, Chicago & St. Louis Railroad Co. 169 O.S. 505, 160 N.E.2d 311 (1959).

Visintine cites Restatement, Contracts, §133, to identify the different categories of third party beneficiaries: creditor, donee and incidental. In considering the scope of a "creditor beneficiary", it cited 4 Corbin on Contracts, 97, §787, and distinguished cases from outside Ohio. It upheld the third party beneficiary rights in a situation analogous to the Winslow sisters.

Ohio follows the general rule of permitting "creditor beneficiaries" to enforce contracts, 11 O.Jur.2d, 1966 Supp. 45, Contracts, §180, fn. 9, citing Visintine. See 11 O.Jur.2d, §180,

Smith also erroneously claims that its market analysi "correctly concluded that [Nutwood] was not suitable for a regional shopping center" and was sold "for its full value (Smith Op. Br. 50).

The Court rejected both contentions. All it found wa

> ". . . has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error . . ." (R. 1469)

And, in its Final Memorandum Decision on reargument, it e deleted a phrase that had stated as to the market analysi

> ". . . the conclusions of which were fundamentally accurate . . ." (R. 2029, lines 29-30)*

Thus, the Court's Finding No. 8 of compensatory dama Hilltop Realty of $2,920 and to the Winslow sisters of $2 a reasonable exercise of the Court's discretion because:

> "The fair market value . . . of a reliable and trustworthy market analysis was at least equal to the price which Larry Smith & Company billed Hilltop for their analysis . . ." (R. 2028-9)

Proof of Such Gross Fraud As To Justify Punitive Dam Under Ohio Law:

> Finding No. 9 of Smith's Wanton and Reckless Disregard Of The Legal Rights Of Hilltop (supra, p. 7). [Smith's Spec. of Errors Nos. 5(b), 7]

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* Note that, by Smith's Appendix method and its referenc t Transcript rather than the official Opinion in the Rec d significant modification is obscured, cf. R. 2029, lin and Smith App. 17 quoting Tr. 2779, line 4.

(Smith Op. Br. 35), and charges that the Court:

> "After learning through post-trial briefs that constructive fraud would not support . . . punitive damages, ... found . . . actual fraud because it showed 'a wanton or reckless disregard for the rights of others . . .'" (Smith Op. Br. 59)

And Smith further charges that the Court:

> "After being furnished with further briefs which indicated that if 'wanton or reckless disregard' was ever a sufficient predicate in Ohio for punitive damages, that day was long past, ... announced that the same nondisclosure constituted 'extreme and exceptional conduct' constituting a 'gross fraud' . . ." (Smith Op. Br. 60)

Hilltop will show there was and is no basis whatsoever for ch charges. The Court considered Ohio punitive damage law more an a year before its Final Decision (Memo Dec. R. 827, 831, ne 20) and told the parties "to concentrate . . . in your briefs . . on all the evidence" (Tr. 2566, lines 10, 11, 19), includ- g proof of "actual fraud" (Tr. 2569, line 1). Under Ogle, pra, its "remarks" are merged in the Findings of Fact. As this urt held in affirming another court's findings:

> "In reaching this conclusion we have taken into consideration the fact that, in the prior hearing, and on two different occasions during the . . . present hearing, the trial judge expressed [a different] view . . . When the evidence was all in, however, the judge, as he had the right to do, changed his mind as to what the evidence proves.
>
> "Since there was substantial evidence to support the final view, incorporated in the findings of fact, the

circumstance that it is inadmissible with preliminary views during the trial . . . is without significance.

E. V. Prentice Mach. Co. v. Associated Plywood Mills, 252 F.2d 473, 479 (9th Cir. 1958).

Nor is Smith's personal charge supported. It filed o April 29, 1965, a 13-page brief (Paper 212)*; the last thr pages addressed to Ohio punitive damage law citing a numbe same cases that it now cites. Its Post-Trial Brief speci incorporated this brief (Paper 260, pp. 77-8)* and cited t the same cases, including Saberton v. Greenwald, 146 Ohio 414, 66 N.E.2d 224 (1946).

First, there is no basis whatsoever for Smith's cont that, if:

> ". . . 'a wanton or reckless disregard' was ever a sufficient predicate in Ohio for punitive damages, that day was long past . . ."

It is not "past". The Court quoted the latest Ohio Supre decision, Saberton, supra, (R. 1472, lines 20-25, 2031, l 19-25).

All that later transpired was that the Court, respon Smith's brief filed "sua sponte", raising issues of puni ages which the Court thought "had been decided and laid long ago", permitted Smith's counsel to reargue these is a hearing originally set for argument solely on the fact issues re punitive damages (R. 2028).

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* These are all available in the District Court Clerk's

cases alleging an Ohio "judicial trend" toward requiring "ill will or hatred" in punitive damages for fraud (R. 2032, line 23). It noted Ohio distinctions between the requisite elements for fraud as contrasted with "malicious prosecution" or "alienation of affection" (R. 2032-3).

It adhered to its prior decision, stating in part:

> "The court based its conclusions on two Ohio cases, Saberton, supra, and Sears v. Holly, 178 N.E.2d 91, Ohio Ct. App. 1960." (R. 2031, lines 5-7)

It was from this Sears case, and not, as Smith asserts, from something "learned" by the Court from later briefs, that the Court, citing Sears, held the facts here also constituted:

> ". . . 'extreme and exceptional conduct' constituting a 'gross fraud' which was 'intentional and deliberate' . . ." (R. 2035, lines 6-20)

Thus, not only are charges suggesting the Court whittled its opinions to fit newly "learned" cases most inappropriate, but they are also wholly erroneous.

The only question on review of the Court's Finding No. 9 is whether the facts here showed such "a wanton or reckless disregard of the legal rights" of Hilltop as to justify the Court's exercise of discretion in awarding punitive damages. It would unnecessarily lengthen this brief to summarize those facts again.

This Court has recently reached an identical decision applying Hawaiian law as did the Trial Court applying Ohio law. It

In Hawaii, as in Ohio, the grounds for punitive damages a
the disjunctive "or" depending on the facts and nature of
case. The cited portion contains four "or" alternatives
cludes:

> "In such cases a reckless indifference to the right of others is equivalent to an intentional violation of them." 297 F.2d at 728.

This court cited other jurisdictions, including Ohio
the following proposition:

> "It is generally recognized that actions for deceit are included in those cases in which exemplary damages may be properly awarded. /47

Its supporting note 47 quotes Waters v. Novak, 94 Ohio Ap.
115 N.E.2d 420 (1953), which, in turn, relied on a Massac
case. Smith urges a contrary conclusion on the semantic o
"malice" (Smith Op. Br. 63) but, the relevant heart of Wa
is again the disjunctive, "or reckless disregard . . .":

> "In this case [Waters v. Novak] seeking recovery fo deceit the court submitted to the jury the question of awarding exemplary damages by an instruction sta ing:
>
> "'Malice consists of bad motive or such wanton and reckless disregard of the rights of others as to show evil intent.'
>
> "Upon appeal from a judgment including exemplary da ages, the court approved that instruction; and in di cussing what constituted active malice quoted from Gott v. Polsifer, 122 Mass. 235, 239, its statement that such malice
>
> "'May consist either in direct intention to injure

another or in reckless disregard of his rights and of the consequences that may result to him.'" id., n. 47.

ccord: Reynolds Metal Co. v. Lampert, 316 F.2d 272 (9th Cir. 1963)

Clearly, the evidence specified above supports the Court's inding that Smith's fraudulent concealment was a reckless disre-ard of the rights of Hilltop Realty and the Winslow sisters.

> Finding No. 10, that Smith's Fraudulent Concealment Was Authorized By Smith's New York And Eastern Division Managers Within The Scope Of Their Employment (supra, p. 7).

Smith concedes this vital finding (R. 1472-3). Smith does ot note it or bracket it as a Specification of Error (Smith Op. r. 26, footnote; App. 13).

> Findings Nos. 11, 12 & 13, of Calculated, Deliberate And Intentional Concealment Pursuant To Company Policy; of Inescapable Inferences That One Or More Partners Were Aware Of, And Acquiesced In, The Concealment; and that Treiger's Later Attempts To Justify And Minimize Concealment Must Have Come To The Attention Of, Or May Have Been Authorized By, One Or More Of The Partners; (supra, p. 7)[Smith's Spec. of Errors Nos. 11, 12];
>
> Finding No. 14, that Any Of These Factors Standing Alone Supports A Finding Of Joint And Several Liability For Actual And Punitive Damages Under Ohio Law; (supra, p. 7) [Smith's Spec. of Errors No. 5b, 11]; and
>
> Finding No. 15, of Extreme And Exceptional Conduct Which Was Intentional And Deliberate Constituting Gross Fraud Under Ohio Law (supra, p. 7)[Smith's Spec. of Error No. 5b].

If, notwithstanding Ogle, supra, the Court's "remarks" are ertinent, Finding No. 11 is the one "exception" (R. 2565, line 25)

the trial concluded (Tr. 2565-6):

> ". . . Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein or to refuse the job.
>
> "I am satisfied that this concealment was originally and throughout the entire relationship between Smith and plaintiffs calculated, deliberate and intentional as distinguished from inadvertent, accidental or misunderstanding." (Tr. 2567-8)

The Court then expressed the oral view that, as a min was constructive fraud and expressed no views as to actual although it was presently of the belief that both Petti an relied upon the report and that the Winslow sisters, in tu lied upon the report (Tr. 2567-9).

The Court's finding that Smith's concealment was done p to company policy "as defendants so clearly demonstrate in t Post-Trial Brief, §XIII, p. 99, et seq." (supra, 7; R. 14 the section that claims concealment was because of the im Austin-Smith sale. This does not mitigate a calculated, ate and intentional scheme. On the other hand, it streng

Findings Nos. 12, 13, 14 and 15, are supported by th and proper inferences to be drawn by the trier of the fac are in accord with Ohio law. Smith argues the Court's in are wrong and that Treiger's acts were not ratified (Smit 39-40, 71-79).

We have described, supra, pp. 17-19, the widespread i tion of the "reading file" which was available to everyo

mith's offices. It included Treiger's memorandum of his first hone call to Petti (Tr. 2592-3). Smith's Opening Brief refers o many of these interoffice memoranda in the reading file (Smith pp. 37, 39, 46). After five years of struggle to develop the aw land of Severance into a regional shopping center site, it is ncredible that the partners were not well aware of Hilltop's in- uiry. While they, of course, deny it, this is nothing new in a raud case. Usually there are no confessions, and it is determined y the court or jury from voluminous evidence and inferences there- rom.

One key is Treiger's participation. He joined Smith as a statistical clerk" in Seattle in 1951. He was then a "report riter". By 1954, he went to New York as an analyst and "assistant o the senior partner . . . Larry Smith" (Tr. 1307-8; R. 1058). t the outset of the Severance project, he was an assistant to arry Smith who was the consultant. His duty was essentially to repare the economic analyses. Then, he succeeded Larry Smith as ccount man when the job became a regular retainer in 1955 R. 1069; Tr. 1310-2). He went to Cleveland on numerous occasions or the Severance project (Tr. 1312-3). In 1957, he was advanced o Assistant Manager of the Eastern Division, which position

> ". . . involved direct client contact and the use of discretion in an executive position, until September 30, 1960." (R. 1058-9)

his compensation [illegible] (R. 1059),
also participated with the Smith partners in a Smith affil
Cleveland Heights Associates, which, in turn, owned stock
other Smith affiliate which owns Severance shopping center
adjacent land (R. 1059-60).

Although Smith claims, without Record citation, that
was in charge of the Eastern Division and turned Hilltop'
over to Treiger, "one of his Account Executives" (Smith O
Imus himself testified that, while another Account Execut
Steinberg, worked under Imus, Treiger "was essentially .
independent of me, essentially from an operating standpoi
(Imus, Tr. 775)

"Q. Who was he responsible to?

"A. Primarily to Mr. Smith with respect to professi
matters." (Imus, Tr. 776)

On the very same day that Treiger talked to Petti ab
"ethical conflict of interest problem", Monday, the 28th o
September 1959] (Ex. 31), there was a meeting of Smith's
Division attended by Larry Smith, Treiger, Imus and Kell
cuss the financing of Severance with Lambert (Ex. 254).

Treiger knew Kelly was aware of Hilltop's inquiry
present at the meeting at which it was decided that it
to undertake the work for Hilltop", and he also told Or
Imus (Tr. 1819-20). But, notwithstanding the concurren

Ex. 254), each of these executives and Larry Smith denied that e had been informed of the Hilltop inquiry. Treiger testified hat he had not told Larry Smith (Tr. 1820). Imus assumed he new of the Hilltop inquiry on September 28, 1959, but does not ecall any discussion "of making a study for Hilltop of the competi- ive Nutwood property" (Imus, Tr. 2593).

The succeeding events have been outlined above: Treiger's ursuit of Petti; its acceptance on December 7, 1959, of a $4,500 ontract payable in installments after a 90-day projected study as completed; the intervening execution of 25-year leases with everance by Higbee and Halle department stores on December 22/23, 959 (R. 1207), on the basis of which Smith went forward with s purchase of Severance (R. 1189, 1190, 1197, 1203, 1225); the sty drafting of a negative Nutwood report over the Christmas liday period rather than the 90 days forecast (R. 1205-6, 1212); eiger's letter of elation to Higbee of December 29, 1959, that ter five years of struggle, ". . . the Severance lease is now gned -- this is fine news . . . to begin the New Year." (R. 1208); e newspaper publicity the following days which was totally lent as to any impending purchase by Smith of Severance from stin (R. 1209-11); Treiger's telephone call, the first working y of that New Year, Monday, January 4, 1960, telling Petti of ith's negative conclusions re Nutwood (R. 1212); Treiger's trip

associates, on January 18, 1960, and his memorandum to the

ing file (R. 1212) stating:

> ". . . they accepted our conclusions with respect to a negative potential for regional, intermediate or neighborhood shopping centers . . ."

and are now contemplating a recreational land use of Nutwo

> "Where fraud is to be shown by circumstantial evidenc such evidence is to be considered in its entirety wit out giving undue importance to isolated facts; althou each circumstance alone may be trivial and unconvinci the combination of all the circumstances considered t gether may furnish irrefragable and convincing proof fraud."

37 C.J.S., Fraud, 436-7, §115.

The Court saw and heard the principal witnesses and l evaluate their credibility:

> "Trial courts observe the witnesses. We cannot. Our sole function is to find if there was enough evidence to pass the clearly erroneous test. We find there was."

Ogle v. United States, 362 F.2d 899, 901 (9th Cir. 1

Clearly, there was both direct and circumstantial ev supporting the Court's finding of an "almost inescapable i that one or more of the partners was aware of the conce acquiesced therein. The Court's findings, on all the evi rejected Smith's contrary assertion (R. 1473). Smith rel primarily on contrary oral evidence and "erased" post-tr marks" of the Court; Ogle, supra. Under Ohio law, whe ployer authorized the act, it is responsible in punitive

152 N.E. 641, 642 (1926).

nith conceded that acts by Treiger were in the course of Smith's usiness in the sense of respondeat superior (Tr. 740, 2306).

There is further evidence of ratification. In August 1960, 'Neill and Petti asked Smith for a "full explanation" of Cleveland ewspaper announcements that Smith had purchased Severance (R. 1245) s a result, Treiger prepared a memorandum "intended to serve as a asis for discussion" at a meeting in Cleveland with Petti and 'Neill. It also went to the reading file (R. 1246ff).

Is it credible that this "reading file" memorandum, seeking nswers to Hilltop's serious charges, went unknown by the partners? he inference is clear they knew and approved its preparation and ls expenses in going to Cleveland to try to placate Hilltop.

After his trip, Treiger wrote a memorandum to the reading ile of the meeting which stated in part:

> ". . . Mr. O'Neal [sic] took the position that he was well informed of the fact that we had a consulting responsibility to the Austin Company at the time that we undertook the work for them. However, under a condition of proprietary interest, the extent of the conflict of interest, and this is the important point, was greatly expanded, and we owed them an obligation to inform them of the fact that we were submitting our report under different circumstances than existed at the time that we undertook the work. It would then have been up to them to decide whether to accept our conclusions and our findings, or to seek other guidance in the matter, although they do not question the fact that they owed us the money and would have paid us in any event.
>
> "I do not believe that they were satisfied as a result of the meeting, and it was left on the basis that we would get in touch again." (R. 1248, line 17ff) (Empha-

report made?

Hilltop's follow-up letter of September 17, 1960 (R. 1 asking exact details of the Smith-Austin relationship went unanswered.

On October 20, 1960, Hilltop's General Counsel wrote a (Ex. 15; R. 1251) to Smith on the subject. It went unanswe

Meanwhile, after all of these protests, Treiger, at La Smith's personal suggestion, was transferred to Smith's affi Winmar Realty, at increased compensation (Tr. 1808-9).

On November 29, 1960, although transferred from the Sm payroll, Treiger wrote two reading file memoranda with copi New York, Chicago, Seattle, and Washington, D. C., relaying t telephone calls from Larry Smith's executive secretary, Hi Bitz](Tr. 190, 2382), who is also Secretary of the Smith p ship and various of its affiliates (Ex. 166). Treiger gav structions concerning a "reanalysis" of the Nutwood market tial or opinions on the adequacy of their original study a ected that copies of the original report should go to Miss and to Spring, its Cleveland lawyer (Smith Op. Br. 25; R.

All of these memoranda and letters had the same type

istribution as is shown, for example, on Exhibit 58A* (Tr. 1806, 112).

This led to the "substantiating report" dated December 15, 960 (Ex. 10) but not tendered to Hilltop until February 15, 1961 R. 1256). Treiger and Imus directed Steichen exactly how to pre- are it (cf. Ex. 10; R. 1252-3). It was not done out of the blue, s Smith asserts, by assignment to a senior associate "who had not articipated in any manner in the original study" (Smith Op. Br. 5). And, by August 1, 1960, Imus and Orndahl had become Smith artners (R. 1058). Hence, their precise knowledge became that of ne partnership before the "substantiating report" was prepared or elivered.

Hilltop agrees that liability for punitive damages may be ased on either authorized ratification or participation (Smith Op. r. 75). Hilltop submits that all of the evidence warrants the nference that was "inescapable" (R. 1473).

25 C.J.S., Damages, 1966 Rev., 1158, §125(5), states:

> "Slight acts of ratification are sufficient, and a principal may be liable for exemplary damages without any acts of express ratification, if the circumstances warrant the inference that he intended to assume the consequences of his agent's conduct without investigation or inquiry . . . The attempt of the principal to

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To avoid burdening the Record with repetition of Exhibits, of which textual contents are in the Pretrial Order, many Exhibits showing stamped Xeroxed distribution to Smith's many offices were not offered in evidence (Tr. 738). They were identified (Smith App. 177-84) and retained in the District Court Clerk's file under revised F.R.Civ.P. 75, and stipulated to be a "part of the Record on appeal for all purposes" (R. 2200).

ratification."

And C.J.S. repeatedly cites in its new 1966 edition, Sabert supra, in support. Its official syllabus, which under Ohio controlling, "in the light of the facts and issues"*, provi

> "3. Where an employer expressly or impliedly ratifies such actionable conduct of his employee, punitive damages may be recovered from the employer . . ." 66 N.E. at 224.

Its majority opinion parallels on different facts the situ here. The Court noted there was evidence that the commodi not quality merchandise"; and that "the store manager who [the commodity] to plaintiff was retained thereafter in th ment of defendant", 66 N.E.2d at 231.

Here the Court has expressly found that the original le and the substantiating report were not "quality merchandis". They showed mistakes, errors and examples of unprofessiona manship (R. 1473-4), further detailed in Hilltop's concurr filed Opening Brief on Cross Appeal. But Treiger was ret a salary increase in spite of all this. Clearly, there w fication.

22 Am.Jur.2d, Damages, 353, §259, states:

> ". . . slight acts of ratification will be sufficien to support a claim for exemplary damages against the employer.
>
> ". . . The fact that an employer retains an employee after knowledge of the latter's wilful and malicious conduct tends to prove ratification of the employee's act sufficient to support a verdict against the

*Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 442, 2

view that the subsequent retention or promotion of the employee guilty of the wrong is of itself sufficient evidence of ratification."

It is respectfully submitted that none of the cases cited in mith's Brief supports any different conclusions under applicable hio law. They are chiefly the same cases that the Court carefully reanalyzed or involve entirely distinguishable facts.

At best, all that Smith urges is that the law of Ohio might e changed some day. But the offenses were committed in 1959-61 nd Ohio law as of that date governs rather than some speculative ature change in Ohio law. As was held in Hausman v. Buckley, 99 F.2d 696, 704 (2d Cir. 1962):

> "In any event the proper function of this court is to ascertain what . . . [Ohio] law is, and not to speculate about what it will be, or in Learned Hand's felicitous phrase, 'to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'"

The inferences are inescapable that one or more of the 1959 rtners authorized, ratified and participated in, the concealment nd that they, together with the August 1960 partners, Imus and ndahl,* authorized Treiger's later attempts to justify and mini-ze the concealment. There was further ratification in retaining Treiger as an employee and, in his joint participation with mus, by then a partner, in directing the preparation of the elaborate and gratuitous "substantiating report" in 1960-61 (Ex. 10) nd, perhaps, in trying to exculpate the partnership by transferring Treiger off its payroll to a Smith affiliate at a higher

The Court carefully, clearly and concisely stated its sons and conclusions that, under the facts and currently ap Ohio law, punitive damages are proper (R. 2028-39; reprinte App. 15-26).

Therefore, it is respectfully submitted that Findings 11 through 15 are abundantly supported by the evidence and rectly apply Ohio law.

Proof that Hilltop Was Fully Justified in Prosecuting This Suit, Thereby Incurring Substantial Expenses:

> Findings Nos. 16, 17, 19 & 20, That The Mistakes, Errors and Examples Of Unprofessional Workmanship In Smith's Two Reports, Together With The Concealed Conflict Of Interest, The Competitive Positions Of Severance And Nutwood, The Deliberately Withheld Information And Other Suspicious Circumstances Which Hilltop Discovered, Fully Justified The Prosecution Of This Lawsuit (supra, pp. 8-9)[Smith's Spec. of Errors Nos. 9, 10]; and
>
> Finding No. 18, that Smith Was Obligated To Provide A Trustworthy Market Analysis Which Was Rendered Totally Unreliable And Highly Suspect By Its Concealed Pre-existing Conflict Of Interest (supra, p. 9)[Smith's Spec. of Errors Nos. 4, 9, 10].

Mistakes, errors and examples of unprofessional workm are documented in Hilltop's concurrent Opening Brief on Cr Appeal, Argument, Sec. C. Smith's concealed conflict of i is admitted (R. 1248, ¶317). The competitive positions Severance and Nutwood is admitted (supra, pp. 17-18, 23). Introduction to the Nutwood report (Ex. 175, 3 bottom pag

tely withheld (supra, p. 26). Other suspicious circumstances re briefed under Intent to Deceive (supra, 20-27).

Smith argues that, since a partial disclosure was made long after Hilltop had sold Nutwood in reliance on Smith's egative report) that, nevertheless, when Smith delivered its substantiating report" of February 15, 1961, Hilltop should ave abandoned its causes of action for fraud, breach of con- ract, and antitrust violations (Smith Op. Br. 70).

It asserts that the Court's finding of "deliberately with- eld information" (R. 2030) referred only to the Smith-Austin greement. Smith cites only "colloquy between the court and ounsel" (Smith Op. Br. 66). But its citation of R. 2123-5 oes not support its contention:

> "MR. STEPHAN: . . . But what was disclosed to Mr. O'Neill at that time was just that the thing had been accomplished on February 10, 1960. . . . What else did we learn? We learned everything that we could . . . through the hostile lips of adverse witnesses, and here is one thing we learned, Exhibit 175. . . . says on its caption in the handwriting of the defendants, 'None of this used in the report to the client' [Hilltop] . . .
>
> "THE COURT: Yes, this is coming back to me . . ." (R. 2124-5)

Smith's other citation (Smith Op. Br. 66) refers again to lloquy of what was withheld (R. 2132-4). Hilltop pointed out at its Interrogatories asked for "work papers" and did not t them; that its charge was against Smith in withholding the

"MR. STEPHAN: . . . We charge the defendants with willfully withholding the essential ingredient that would have changed this picture 180 degrees."

Thus, the Court's finding of withheld information was many factors discussed above. First, that Smith was buyi competitive property while purporting to give an objective report on a competing property, Nutwood; Second, that Sm knew, as a market analyst, that the site on which he was a to make such a report was in the very trade area of Severa Third, that the report was not scientific but one in which ment could vary widely; Fourth, that other nationally rec nized consultants were available; Fifth, that such an obj and favorable report would be a valuable and virtually es prerequisite to attracting department store tenants; Si that its concealment continued during nearly a 4-month in between Treiger's negative telephone advice to Petti on January 4, 1960 (R. 1212) and the sale of Nutwood on Apri 1960 (R. 1238), notwithstanding an exchange of letters i 1960 in which Treiger said he expected to call on Petti w was in Cleveland (Exs. 47, 48), and Treiger's professed "i ment in the outcome of the analysis" (Ex. 48).

Clearly, this Court's finding, that the expensive l might have been avoided, referred to Smith's successive nities to disclose to Hilltop its impending purchase of before undertaking the Nutwood market analysis, or befor

ustin agreement was consummated (cf. Smith Op.Br. 39), or even hen acknowledging Hilltop's payment of its bill in full (supra, . 34) on March 22, 1960; or, if post-trial remarks are admis-ible, as the Court said:

> "Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein, or to refuse the job." (Tr. 2567)

ny of these would have entirely altered Hilltop's reliance on mith and its report in selling Nutwood for residential purposes, n April 29, 1960, at $3,500 per acre.

Hilltop presented substantial evidence that, had an objec-ive report been made, Nutwood could have been sold as a region-l shopping center site for at least $17,500 per acre. The ourt rejected it only on legal grounds (R. 1470). Assuming hat Hilltop failed to sustain a legal burden of proof, from hich Hilltop cross-appeals, such a legal conclusion does not ean Hilltop could not successfully have attracted one or more f the several other remaining available department stores as enants had an objective study, in this judgment area, by other eputable market analysts been made. Thus, Smith itself, dur-ng a 5-year period of efforts to commit Higbee and Halle, eported other stores were interested in locating branches in he eastern Cleveland suburbs: In 1958, Montgomery Ward con-idered a 160-180,000 sq. ft. store (R. 1143, 1133-4); and

Sterling-Lindner-Davis (R. 1118) and Sears, Roebuck (R. 11 showed like interest. As late as 1959, The May Co. was t only department store rival to other eastern Cleveland sit (R. 1066-7, 1158).

Smith next claims that expenses reflect, in part, def of "baseless monopoly claims" or "specious state and feder antitrust claims" (Smith Op.Br. 39, 70).

The summary dismissal without trial is briefed in Hi Brief on Cross Appeal, pages 1-29. But, in evaluating Sm assertions, this Court should know of two prior Memorandu sions on antitrust which Smith ignores. After briefs an argument, the Court, on May 13, 1963, upheld the antitrus charges of the original Complaint without prejudice to thi ing again raised after entry of a Pretrial Order (R. 21-2*. Hilltop's counsel would have been derelict indeed to its cli if it failed to expend good faith discovery efforts on th se issues. More than 18 months later, after much discover efforts by all parties, the Court, on December 14, 1964, re further discovery and ordered Hilltop to file a detailed con cise statement of its factual contentions (R. 530-2).

On March 29, 1965, the Court rendered a second Decision (R. 827-35, at 829-31)* which reversed its prior Decisio

*Attached as Appendices A and B respectively to Hilltop' Opening Brief on Cross Appeal.

ccepted as true the contentions and all reasonable inferences, ut, upon reconsideration, held they did not constitute anti- rust violations.

Hilltop's Cross Appeal alleges error of law in this ruling. ut the point is that pretrial discovery efforts from the fil- ng of the Complaint up to the time of the Court's reversal of ts earlier holding on March 29, 1965, is in accord with the ourt's Finding No. 20 that all of the circumstances, including the competitive positions of Nutwood and Severance":

> " . . . fully justified the prosecution of the fraud and contract counts . . . [and] also . . . the anti- trust counts up to a point which the court need not determine . . . " (R. 2030, lines 3, 6-8, cf. 2049-50)

Finding No. 18 (supra, p. 56) is separately listed only ecause Smith's Specification of Errors No. 4, as well as its os. 9 and 10, challenge this finding (Smith. App. 17).

Hilltop submits that Finding No. 18, that Smith was obli- ated to provide a reliable and trustworthy market analysis, hich was rendered totally unreliable and highly suspect by he subsequent discovery of Smith's tortiously concealed pre- xisting conflict of interest is self-evident from the fore- oing facts and argument.

It is respectfully submitted that the evidence as to Find- ngs Nos. 16 through 20 abundantly supports the Court's find- ngs and conclusions that Hilltop was fully justified in prose- uting this lawsuit, thereby incurring substantial expenses.

And Punitive Damages, And Attorneys' Fees, Was Within The Court's Discretion:

> Finding No. 21, that Hilltop And The Winslow Sisters Shall Each Recover Compensatory and Punitive Damages; And Jointly A Reasonable Attorneys' fee (supra, p. 9). [Smith's Spec. of Errors Nos. 2, 3,5, 6, 8, 10].

The Court, in the first of its two final Memorandum s sions, indicated its modest criterion of punitive damages

> "The court therefore proposes to fix punitive damage and he has in mind, as a minimum, such amount as wil reimburse plaintiffs expenses in the prosecution of this action and also the possible award of an attor- ney's fee as is authorized by the law of Ohio . . .. (R. 1474)

Hilltop and the Winslow sisters complied with the Cdr direction (R. 1487-9) to file detailed schedules of thei o of-pocket expenses (R. 1498ff). They had contributed ea to a joint litigation expense fund account (R. 1498, 181), in which out-of-pocket expenses totaling $72,406.42 (R. 49 2015) had accrued through May 1966 (R. 2025). Hilltop a so tributed some 3,461 of uncompensated management hours (R 15 plus countless unrecorded hours by clerical personnel (R 15

The Court's award of $40,000 punitive damages to Hilto (R. 2038) was only $4,000 over its one-half share of th $72,406.42 actual out-of-pocket expenses paid through Jua 1966 (R. 2025). At the most, this would only reflect uncompensated managerial and clerical time at scarcely $1.00 per hour. It awarded $35,000 to the Winslow sisters which was over $1,000 less than their one-half share of ac

Cleveland and Seattle counsel complied with its direction R. 1489) and filed their time recordsand rescinded their con-ingent fee agreement (R. 1500, 1908). It itemized over 7,638 ours on this case through November 24, 1965 (R. 1500).* Its waiver of costs" (R. 2136-7) now objected to (Smith Op. Br. 9) was to avoid any duplication of "costs" such as filing, ser-ice and witness fees, bonds, etc. billed to and paid by Hill-op as litigation "expenses" (e.g., R. 1764, 1779, 1800).

The Court's award of $75,000 attorneys' fee was about 10.00 per hour for the time spent on all four counts of the omplaint and only slightly in excess of that based upon esti-ates which excluded time devoted solely to antitrust (R. 1500). his is less than one-third of agreed normal time charges R. 920).

The Court found that counsel on both sides were competent nd thorough; that the case had been well tried and all coun-el had given their respective clients the benefit of every easonable argument and shred of evidence by expending diligent efforts (R. 1469, lines 17-19, 26-31). If its post-trial emarks" are appropriately considered, the Court stated:

> " . . . [T]his is one of the most thorough and best investigated cases that has come before me." (Tr. 2566)

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*ursuant to the earlier instruction of the Court, supra, 700 urs were estimated as antitrust (R. 1500).

Its conclusion that $75,000 was a reasonable attorneys' fe
supported by the evidence and is a conscientious exercise
the Court's discretion. The Court noted it

> " . . . will not adequately compensate plaintiffs' counsel for all of the time they have devoted to this case but the court believes, considering all the circumstances, that such an amount is reasonable." (R. 2038, lines 24-30)

Smith's remaining objection is that it violates an al
Ohio "ratio rule" (Smith Op. Br. 65) citing only Richard v
Hunter, 161 Ohio St. 185, 85 N.E.2d 109, 112 (1949). Its
issue was not a "ratio rule" but whether a jury's verdict
porting "compensatory damages" as "none" and "punitive dam
as $200 should be affirmed. The court quoted with approv
from 15 Am.Jur. 707, §271, that punitive damages may be r
covered though actual damages are "nominal", but the ver-
dict of compensatory damages was not even "nominal"; it as
"none". Richard cited various other cases, including a par
lel West Virginia case where the jury's verdict for compensa
tory damages was "blank" and for exemplary damages, $1,00
Smith's quotation from this West Virginia case (Smith Op. Br.
that punitive damages must bear a reasonable ratio to compen
tory damages was dictum, both in Ohio and West Virginia.
following sentence held:

> "In the absence of an award of compensatory damages an award of punitive damages may be taken as an indication that the jury was actuated by passion, prejudice and improper motives in making such finding." 85 N.E.2d at 112.

In State v. Cameron, 91 Ohio St. 50, 109 N.E. 584, 586 1914), the Ohio Supreme Court said:

> " . . . In our own state today there is no limit on the punitive damages a jury may award, in addition to just recompense for personal wrongs involving the elements of fraud . . . "

In Saberton v. Greenwald, supra, the Ohio majority specically rejected a "ratio rule". The dissenting opinion specically pointed out:

> "In this case the plaintiffs recovered full compensatory damages in the sum of $38.15. . . . We are now remanding . . . to submit to another jury the question of punitive damages and to advise it that plaintiff may recover such damages as it deems proper, not however in excess of a sum of $5,000 . . . prayed for in the petition which is more than 128 times the amount of the actual damages suffered."

This Court had considered analogous situations. Davenport . Mutual Benefit Health & Accident Association, 325 F.2d 785 1963), involved a claim of $10,000 for actual damages and 100,000 for punitive damages. Appeal was from dismissal for ack of a jurisdictional amount under diversity. This Court eversed. It reviewed Oregon punitive damage precedents, inluding one affirming $250 of actual damages and $2,750 of puniive damages, 325 F.2d at 789, n.2; and Bell v. Preferred Life ociety, 320 U.S. 238, 241-3, 64 Sup.Ct. 5, 6-7, 88 L.ed. 15 1943), which reviewed Alabama and South Carolina precedents, ncluding one affirming a verdict of $11.70 actual and 1,211.70 punitive, 320 U.S. at 241, n.5. The Supreme Court

"But neither in these cases, nor in any others cited to us, has that court held that punitive and actual damages must bear a definite mathematical relationship." 320 U.S. at 242.

At the most, as stated in the 1966 edition of 25 C.J. Damages, 1164-5, §126(1), there is no ratio rule but only r of reasonableness under all the circumstances.

It is respectfully submitted that, under all of the c cumstances, the Court's findings that its allowance to Hi t and the Winslow sisters of scarcely their out-of-pocket e e and to their attorneys, as part of compensatory damages u le Ohio law in such a case, 25 O.Jur.2d, Fraud and Deceit, 3, a fee which, based on hours spent, was less than one-thir t normal time charges (cf. R. 920), was a judicial exercise f cretion and should be affirmed.

Proof That the Court's Conclusion to Apply Ohio Punitive Damage Law is Correct:

> Finding No. 22, of The Proper Application of Ohio Punitive Damage Law to Washington Defendants Who Voluntarily Ventured Into Ohio To Commit Their Misdeeds (supra, p. 10). [Smith's Spec. of Errors No. 5(a)].

Smith's Brief and Appendix omit any reference to the tri Court's Memorandum Decision of May 25, 1965 (R. 1021-3), att ed hereto as Appendix A. It fully analyzes this issue.

Restatement, Conflict of Laws, §612, states the bas rule:

contrary to the strong public policy of the forum."

he controlling word is "strong". Richardson v. Pacific Power Light Co., 11 Wn.2d 288, 118 P.2d 985 (1941), is in accord:

> "It is the universal rule that the existence and nature of a cause of action for tort are governed by the law of the place where the alleged wrong was committed . . . (id. 299)
>
> "There is an exception . . . that a foreign cause of action will not be enforced where to allow suit thereon would be contrary to the strong public policy of the state in which enforcement is sought." (id. 300)

n defining "strong public policy", the court continued:

> ". . . the public policy of a state is to be found in its constitution, its statutes, and the settled rules laid down by its courts . . . (id. 300)
>
> " . . . there is a strong public policy in every jurisdiction 'in favor of recognizing and enforcing rights and duties validly created by a foreign law,' and consequently the invocation of the public policy of the forum as a bar to the enforcement of foreign rights of action should be very narrowly limited, especially as between the states of the United States, where serious differences are not likely to be found . . . [citing authorities and cases]." (id. 302)

t then quoted with approval from Herrick v. Minneapolis & St.L. . Co., 31 Minn. 11, 16 N.W. 413 (1883):

> "' . . . To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens.'" (id. 302)

nd continued:

> "'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'" (id. 303-4)

Carstens Packing Co. v. So. Pac. Co., 58 Wash. 239, Pac. 613 (1910), and Farley v. Fair, 144 Wash. 101, 256 P. 1031 (1927), cited (Smith Op. Br. 56), are not contra. involve actions which had important, if not controlling, tacts with Washington's contrary statutory policy. This tinction is noted in Hatcher v. Idaho Gold & Ruby Mining 106 Wash. 108, 112-5, 179 Pac. 106 (1919), when the parti "voluntarily" went to Idaho, just as here Smith "voluntar ventured into" Ohio (R. 1022).

In Building Service Employees International Union v Gazzam, 339 U.S. 532, 537-8, 70 S.Ct. 784, 94 L.ed 1046 the court held:

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the law makers to determine the public policy of the State.'

Nothing in Washington's constitution or statutes pr exemplary damages. On the contrary, the Court's Memora

ashington statutes authorizing exemplary damages enacted over he years. The latest is a 1961 Consumer Protection Act, in tort field closely related to that covered by this lawsuit RCW 19.86.090). Washington courts also enforce Federal treble amage statutes. Walker v. Gilman, 25 Wn.2d 557, 576, 171 P.2d 97 (1946). We agree that public policy

> " . . . does not depend exclusively upon legislation, but may be the result of judicial construction and announcement." (Emphases added.)
>
> Griffin v. McCoach, 123 F.2d 550, 551 (5th Cir. 1941).

In Seattle Crockery Co. v. Haley, 6 Wash. 302, 313, 33 Pac. 50 (1893), the court indicated it would follow the"rules" of ister states:

> "This court in Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45 (25 Pac. Rep. 1072), did not undertake to say that, where the statute expressly provided for them, punitive damages could not be recovered. In such cases, the rules laid down in those jurisdictions where the doctrine of punitive damages is accepted should guide the courts and juries of this state." (Emphasis added.)

t is submitted that the Court's choice of the word "rules" ncludes constitutional, statutory and judicial rules of puni- ive damages in sister states. The Trial Court's Memorandum ecision (R. 1021-3; App. A) is in accord with an increasing rend to uphold foreign based rights. Thus, in Intercontinental otels Corp. v. Golden, 15 N.Y.2d 9, 203 N.E.2d 210, 212 (1964),

---

In addition, there are other examples, e.g., RCW 7.12.080, wrongul attachment; RCW 79.40.030, cutting timber on state land, etc.

where New York forbids enforcement of gambling debts, the nevertheless held as to a Puerto Rican debt which is valid that territory:

> "Since these gambling contracts were [valid] . . . absent a clear showing that the enforcement . . . would 'offend[s] our sense of justice or menace[s] the public welfare' . . . we may not withhold aid. We do not think that public policy forbids us to enforce these contracts.
>
> "Substantially all of the commentators agree that foreign-based rights should be enforced unless the judicial enforcement of such a contract would be the approval of such a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."

Smyth Sales v. Petroleum Heat & Power Co., 128 F.2d 9 (3rd Cir. 1942), is much like this case. It allowed exe damages for fraud which took place in a sister state whic recognizes exemplary damages because the forum state perm them in conflict situations. Here, as the Court found, hi likewise allows punitive damages for fraud.

The question is not the Washington common law judici rule of exemplary damages on actions arising here, but wit the trial court's conclusion that enforcement in Washingon the common law judicial rule of Ohio for actual fraud is pro The Court correctly applied the rule and not the exceptio Restatement, Conflict of Laws, §421, that:

> "The right to exemplary damages is determined by th law of the place of wrong." (R. 1021)

5 F.2d 647, 654 (9th Cir. 1956), this Court stated:

> "[T]his Court defers to the interpretation of the able trial judge, himself a lawyer of the state of long standing, acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state. . . . "

cord: Homolla v. Gluck, 248 F.2d 731, 733 (8th Cir. 1957),

at an appellate court consistently declines

> " . . . to attempt to outpredict, outforecast or outguess a trial judge with respect to a doubtful question of the law of his state."

Thus, the Trial Court's conclusions should be affirmed

at there is no "strong public policy" precluding a Washington

urt from enforcing the Ohio exemplary damage rule since the

aud was committed in Ohio (R. 1021-3; App. A).

CONCLUSION

It was cheaper for Smith to run the risk of litigation for

s fraudulent concealment and false report than to endanger its

pending $4,000,000 stake in Severance by permitting Hilltop's

velopment of Nutwood as a potential competing property which

uld again throw Severance "off balance" (Ex. 313, p. 2).

In this respect this case is comparable to Funk v. Kerbaugh,

2 Pa. 18, 70 Atl. 953 (1908), where defendant wilfully blasted

aintiff's building

> ". . . because it was cheaper to pay damages . . . than to do the work in a different way." 222 Pa. at 19, 70 Atl. at 954.

300.3 .4; Morris, Punitive Damages in Tort Cases, 44 Harvard L. Rev. 1173, 1185-8 (1931).

Hilltop respectfully submits that, under F.R.Civ. P. 52(a), the Court's findings of fraud and its conclusions awarding limited compensatory and punitive damages, and attorneys' fees should be affirmed, and accordingly that Smith's appeal should be dismissed;* and that Hilltop be awarded its costs and disbursements herein.

DATED at Seattle, Washington, December 9, 1966.

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*Hilltop contends in its Opening Brief on Cross Appeal that upon review of the evidence and applicable law, this Court will reach the "definite and firm conviction that a mistake has been committed", United States v. United States Gypsum Co., 333 U.S. 364; 68 S.Ct. 525; 92 L.ed. 746 (1948); because of the trial court's summary dismissal without jury trial of the antitrust counts on erroneous views of current law; and because of its denial of substantial compensatory damages under the contract and fraud counts against a fiduciary.

I CERTIFY that, in connection with the preparation of this
.ef, I have examined Rules 18, 19 and 39, of the United States
ırt of Appeals for the Ninth Circuit, and that, in my opinion,
e foregoing brief is in full compliance with those rules.

By Albert E. Stephan

Albert E. Stephan of
Attorneys for Appellees
HILLTOP REALTY, INC., et al.

PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on December 9,
6, I caused three copies each of the foregoing document to be
ved on Helsell, Paul, Fetterman, Todd & Hokanson, attention
Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washington
lding, Seattle, Washington 98101, counsel for Larry P. Smith,
al., and on Bogle, Gates, Dobrin, Wakefield & Long, attention of
ert W. Graham, Esq., and Ronald E. McKinstry, Esq., 14th Floor,
ton Building, Seattle, Washington 98104, counsel for The
tin Company, by having my secretary mail the same to them at
d addresses in duly addressed envelopes with First Class post-
prepaid, and that said addresses are their last known addresses,
that said attorneys are all of counsel of record for appel-
ts.

By Albert E. Stephan

APPENDIX

[R.1021] Plaintiffs have included in their prayer for re-
ef a claim for exemplary damages as allowed by the law of Ohio
ere the alleged tortious conduct of defendants took place.
e defendants agree that Ohio law permits punitive damages in
rtain circumstances, but contend that the Washington courts,
ose lead this court must follow in this diversity action, be-
use of a strong state policy against punitive or exemplary
mages, would decline to apply Ohio law in this respect.
aintiffs, of course, disagree.

Both parties rely on the same section, §421, of the Re-
atement, Conflict of Laws. Plaintiffs rely on the rule:
he right to exemplary damages is determined by the law of the
ace of wrong." Defendants rely on the exception:
omment a. When damages regarded as penal.* In those states
ere exemplary damages are never allowed, such damages may be
fused in an action on a foreign wrong, whatever the law of the
ace of wrong, on the ground that they are penal. . ." The rule
also found in 11 Am. Jur., Conflict of Laws, §185, and is
plied in O'Reilly v. Curtis Publishing Co., 31 F. Supp. 365
. Mass. 1940).

There can be little doubt that in the case at bar the
le must be applied rather than the exception. First,

*Emphasis in text.

strong public policy of the State of Washington, and secor
Ohio law allowing exemplary damages is not a penal law wit
the sense intended by the general conflict of laws rule th
courts of one state will not enforce the penal laws of an

Richardson v. Pacific Power & Light Co., 11 Wn.2d 2(
holds that the courts of Washington will refuse to apply
of a sister state if such law contravenes a strong* public
of the State of Washington. This court is at a loss to s
there is any contravention of Washington policy if a Fede
court allows exemplary damages under Ohio law to an Ohio
for an alleged willful tort committed by a Washington resi
who voluntarily ventured into the State of Ohio to perfor
misdeed. Furthermore, Washington is not one of those stte
use the Restatement language, "where exemplary damages ar
allowed," since by statute extra-compensatory damages are
able for trespassing swine, RCW 16.12.020; faulty grain
RCW 19.44.050; unlawful detainer, 59.12.170; waste by a
or tenant, RCW 64.12.020; timber trespass, RCW 64.12.030
carrier's failure to redeem a ticket, RCW 81.56.160; and
of trade, RCW 19.86.090. In light of these statutes, it
hardly be said that Washington has a strong* policy again
exemplary damages.

Secondly, the argument misconceives the meaning of the word "penal" as used in the field of conflict of laws.

*Emphasis in Opinion.

ense, is whether the wrong sought to be redressed is a wrong
o the public or a wrong to the individual . . ." Huntington
. Attrill, 146 U.S. 656, 668, 36 L.Ed. 1123, 1128 (1892). See
lso Atchison T. & S. Ry. v. Nichols, 264 U.S. 348, 68 L.Ed.
20 (1924); Daury v. Ferraro, [R. 1023] 108 Conn. 386, 143 Atl.
30 (1928). On the facts of this case there is no public wrong
hich is sought to be redressed and the exception to the rule
pon which defendants rely is inapplicable.

Accordingly, the plaintiffs are not foreclosed from con-
nding that punitive or exemplary damages should be awarded
der the laws of Ohio.

Dated this 25th day of May, 1965.

(s) W. T. BEEKS
United States District Judge [R. 1023]